

BEFORE THE
ILLINOIS COMMERCE COMMISSION

BITWISE COMMUNICATIONS, INC.

Complainant,

vs.

GALLATIN RIVER COMMUNICATIONS, LLC,
MADISON RIVER COMMUNICATIONS CORP.,
AND CENTURYTEL, INC.

Respondents.

Docket No. 07-

0394

VERIFIED DECLARATION OF MICHAEL SHULER

I, Michael Shuler, do hereby state and affirm the following:

1. I am the President and CEO of BitWise Communications, Inc.
2. I have been President and CEO of BitWise since founding the company on May 10, 2000.
3. I submit this Declaration in support of the complaint filed by BitWise Communications, Inc. against Gallatin Rivers Communications, LLC ("Gallatin"), its parent, Madison River Communications Corp. ("MRC"), and its ultimate parent, CenturyTel, Inc. ("CenturyTel")(collectively referred to as "Respondents").
4. BitWise is a Competitive Local Exchange Carrier ("CLEC") organized under Illinois law and licensed by the Illinois Commerce Commission ("ICC").
5. Gallatin is an Incumbent Local Exchange Carrier ("ILEC") licensed by the ICC to provide telecommunications services in the following Illinois exchange areas: Avon, Cameron, Dixon, Forest City, Galesburg, Grand Detour, Green Valley, Harmon, Havana, Knoxville, Lacon,

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COMMUNICATIONS COMMISSION
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Manito, Mt. Carroll, Nelson, North Pekin, Pekin, Savanna, South Pekin, Talbott, Thomson, Topeka, Wataga.

6. BitWise began providing local exchange telecommunications services in Illinois in 2003.

7. BitWise began providing local exchange telecommunications services in the exchange areas served by Gallatin in 2005, several months after its Interconnection Agreement with Gallatin was approved by the ICC.

8. Since 2005, BitWise has relied upon Gallatin for access to Unbundled Network Elements, collocation, and other wholesale services in order to provide retail service to customers. BitWise obtains access to Gallatin's facilities at cost-based prices pursuant to an Interconnection Agreement.

9. I refer to the First Interconnection Agreement between Gallatin and BitWise hereinafter as "First ICA" and the Second Interconnection Agreement as "Second ICA."

10. BitWise is a small company with fewer than 21 full-time employees.

11. I have personally been involved in negotiations with Gallatin regarding interconnection matters, including negotiations of the First and Second ICAs.

12. I, and a handful of other BitWise employees, have observed and engaged in negotiations with Gallatin to resolve disputes over the perceived unjust and unreasonable business practices, as detailed herein and in attachments to the complaint.

"PROMOTIONAL" DS-1 AGREEMENT

13. In this Declaration I first address my dealings with Gallatin over the ICA negotiations:

14. On or about July 2004, BitWise and Gallatin entered into the First ICA.

15. The First ICA established the financial and operational terms for: the physical interconnection between Gallatin and BitWise networks on access to rights of way and databases; unbundled access to Gallatin's network elements, included Gallatin's operations support systems functional collocation, number portability; and a variety of other business relationships.

16. The First ICA contained rates applicable to DS-1 UNE loops. DS-1 facilities are mentioned three times in the PRICES FOR UNBUNDLED NETWORK ELEMENTS, UNE Appendix:

- a. In Part C. Supplemental Attachment VII, Recurring Charges at page 1, there is a \$125.00 recurring charge for DS-1 Entrance Facilities;
- b. On page 2 there is a \$350.00 non-recurring charge for DS-1 Entrance Facilities; and
- c. In Exhibit 3, ISP DS-1 Local Traffic Arrangement, there is a \$138.00 monthly recurring charge for DS-1 Loop.

See Attachment 1 to this Declaration

17. BitWise sold four DS-1s (also called T-1s) to three prospective small business customers, whose local exchange service had been provided by Gallatin. Before I submitted orders for T-1 service based on the terms of the Price List in the First ICA, I first requested confirmation of the pricing because there appeared to be two different DS-1 facilities and two different rates – \$125 for "Entrance Facilities" DS-1s and \$138 for "ISP DS-1s."

18. On March 2, 2006, Karen Lewis, Gallatin Customer Care Supervisor, provided the following "quote" for T-1 service:

Here is the quote for the T1 to your customer Superior Technology Enterprises.

Monthly Recurring Charges

\$270.00 Channel Term

\$75.00 Channel Mileage Term

\$88.00 Channel Mileage Facility (\$20.00 per mile x 4.4 miles)

\$433.00 Total

Non-recurring Charges

\$105.00 Service Order Charge
\$500.00 Line Connect Charge (\$250.00 x 2 for each end)
\$605.00 Total

19. Since this quote did not provide me with proper pricing matching the ICA, I pieced together what I believed to be the applicable components of the T-1 service BitWise needed to serve its prospective customers and presented the following to Gallatin:

John, this pricing is considerably higher than expected and will not work for our business model. According to the ICA:

DS1:

Loop: \$125 MRC
Install: \$350 NRC
Cross Connect: \$0.25 MRC * 2 (remote and CO)
Retail Mileage: \$20 MRC/Mile * ~2 Miles
No order charges listed in the ICA

I was then expecting some sort of interoffice transport charge (which is usually less than normal transport charges). But at full retail that would be \$20 per mile and assuming assuming 4.4 miles which seems high for airline miles... I checked it on our mapping program and its only about 2 miles from the CO to the remote. I'm not sure what part the "Channel Mileage Term" plays in the equation because the circuit is not being terminated anywhere but is actually being cross connected, hence the cross connect fee would apply.

Let me know if the above is not correct.

20. In response to this email, Fred Muri, Gallatin's President, set up a meeting at Gallatin's Pekin office. As time passed, I became concerned BitWise would lose these newly signed customers due to Gallatin's continuing delay. Indeed, one Gallatin customer did, eventually, cancel its service order.

21. This meeting was attended by Fred Miri, Karen Lewis, and me.

22. At the meeting, I requested DS-1s at the rates listed in the First ICA. I specifically alerted Mr. Miri to the \$125.00 quote for entrance facilities listed on page one of "Part C. Supplemental Attachment, VII. PRICES FOR UNBUNDLED NETWORK ELEMENTS,

Recurring Charges.” However, Mr. Miri refused to recognize that the requested DS-1s qualified for this price. To support this, Mr. Miri loosely cite to Newton’s Telecom Dictionary, claiming erroneously that under the definition therein, a DS-1 for an “entrance facility” goes through the wall of a collocation office and has no local loop; therefore, the DS-1s I was requesting fell outside of this definition. I pointed out that this reading of the definition of entrance facility was clearly outside the context of the discussion. Mr. Miri refused to budge from his position, even though it completely disregarded the fact that to offer a UNE at rates, terms or conditions that were outside the scope of the First ICA would require a written amendment, filed with and approved by the ICC.

23. After approximately fifteen minutes of arguing their conflicting positions, I felt that since Mr. Miri was not going to concede to offering the DS-1s under the \$125 Entrance Facility rate, I directed Mr. Miri to page five of the UNE Appendix, in which ISP DS-1s are listed at \$138.00. At this point in the meeting, Mr. Miri left the room, apparently to consult with Stephen Murray. When he returned, Mr. Miri refused to concede that the requested DS-1s were included under this definition, arguing that these DS-1s were not available because they were part of the package price for “ISP DS-1s.” I countered Mr. Miri’s twisted excuse by explaining that telecommunications regulations permit individual UNE elements to be separated from combinations or bundled packages. Again, Mr. Miri was unwilling to concede this point.

24. Recognizing that further definitional arguments would not result in Gallatin provisioning DS-1s at rates specified in the UNE pricing guide, and realizing I was under increased pressure from clients to provision DS-1s, I asked Mr. Miri to provide him with a reasonable quote for the DS-1s.

25. Mr. Miri informed me that he was currently drafting a new Interconnection Agreement with Stephen Murray and was willing to provide DS-1s for the price to be listed in the

new agreement until interconnection agreement negotiations were finalized. Mr. Miri quoted a monthly reoccurring charge of \$193.00, plus an additional charge of \$35.86 for a local four wire loop, and a \$400.00 non-recurring charge on all DS-1s going forward.. At no time did he agree to limit the number of DS-1s provisioned.

26. At this point in the meeting, Karen Lewis interjected that Gallatin's billing system was unable to handle the new pricing arrangement. Therefore, she suggested that in order to accommodate Mr. Miri's quote, Gallatin would provide a credit on invoices each month to compensate for the retail rates on the DS-1s until the new wholesale price was in place.

27. Contrary to after-the-fact statements fabricated by Gallatin to justify their subsequent invoicing and billing enforcement stance (i.e., pay full tariff price now, receive credits only after new ICA is effective), no additional conditions on or limitations to the "promotional" offering were either discussed and were not agreed to by BitWise. I did not agree to an arrangement that would require BitWise to pay full retail tariff prices each month, with the "hopes" of a credit at some indeterminate later date, at least several months in the future. I was also not told that the verbal agreement contemplated only a limited quantity of DS-1s. Rather, I understood the verbal agreement to be limited only in duration to the time period between March 2006 and the date a new ICA was executed.

28. On March 15, 2006, Bev Martin of Gallatin provided BitWise with a quote which it described as a "discount" or "promotional" price for T-1s, as follows:

Mike,

The monthly charges for this T1 includes a 4 wire smart jack:

\$193.00 -T1

\$ 35.86 -Local 4 wire loop

The non recurring charge would be:

\$400.00

29. Due to BitWise's urgent need to provision the circuit to its prospective customer, I agreed to the "promotional" T-1 quote and Gallatin provisioned the T-1.

From: Michael Shuler [mailto:mike@omnilec.com]
Sent: Wednesday, March 15, 2006 1:40 PM
To: 'Bev Martin'
Cc: 'Karen Lewis'
Subject: RE: DS-1 Quote

We accept the rate at this time until the new ICA has been negotiated. We have several pending DS1 orders that have already been submitted several weeks ago. When can I expect due dates on them?

30. Responding to my e-mail, Bev Martin wrote:

Karen gave me three orders for a total of 4 T1s.

1 for Central Illinois Service Access, Inc

1 for Illinois Oil Marketing Equipment

2 for Unland Companies

If there is anymore, would you please send them to me.

The due date would be 10 working days. Ordering today due date would be 3-29-06.

Bev Martin

31. Bev's e-mail confirmed my understanding about the "promotional" DS-1 offer that was made by Gallatin – which was that the only condition was that BitWise needed to begin negotiating a replacement ICA. Certainly, there was no "limit" or "cap" on the number of DS-1s I could order or any time restrictions.

32. This "agreement" on the DS-1 pricing was not memorialized in any written document, other than the e-mail correspondence between Bev Martin and me. The "agreement" was not incorporated into an amendment to the First ICA. And the "agreement" was never filed

with the ICC. Unbeknownst to BitWise at the time, agreeing to Gallatin's promotion was soon to become a billing nightmare.

33. When BitWise received its first invoice containing charges associated with the DS-1 orders, I noticed that Gallatin did not bill BitWise the \$228.86 in recurring charges agreed to by the parties. Instead, Gallatin invoiced BitWise for a much larger amount. The DS-1 pricing in the April 25, 2006 invoice was as follows: Amount Billed: \$667.33 (April 3 - May 24) + \$1,710.00 (3 DS1's NRC)

34. This recurring charge was far greater than the charges quoted by Bev Martin and accepted by BitWise. It also differed from my expectations of what the charges should have been based on his analysis of the various billing cycles applicable to the circuits. For example, in my e-mailed list of disputed charges, I indicate that, if based on the rate quoted by Bev Martin and the fifty-one days from April 3, 2006 to May 24, 2006, the amount owed by BitWise should be \$278.20 per month plus a \$510.00 non-recurring charge.

35. Over the ensuing weeks, throughout May and early June, I contacted Gallatin on several occasions, seeking to confirm his understanding of the \$278.20 and \$510.00 charges. Gallatin did not respond. As the invoice due date arrived, I again contacted Gallatin inquiring as to payment protocols applicable to the DS-1 charges. The questions I presented to Gallatin were simple: Are BitWise's calculations of the "agreed upon" DS-1 charges correctly calculated based on the 51-day billing cycle? If so, does BitWise need to pay only the "agreed upon" promotional rates? Or must it first dispute the charges as they appeared in the invoice, then pay the undisputed portion? BitWise received no response and no answers from Gallatin. The invoice due date came and went.

36. BitWise and Gallatin subsequently initiated negotiations on a replacement ICA.

37. These negotiations included substantial bargaining about BitWise's access to and pricing of DS-1 UNE Loops. DS-1 UNE Loops became a critical element of these negotiations

because, in the several months following Gallatin's offering of the promotion, Gallatin seemed incapable of accurately invoicing BitWise for the promo price.

38. Instead, Gallatin appeared to be invoicing BitWise the full retail tariff rate or something entirely different. Because of this, I repeatedly disputed the invoiced charges, which continued to mount.

39. Despite BitWise's disputes of these unlawful tariff charges for UNE circuits, Gallatin proceeded to treat the unpaid, disputed charges as though they were legitimate, due and owing.

40. Gallatin even proceeded to suspend BitWise's access to ordering systems and threaten disconnection of services due to BitWise's refusal to pay full, retail tariff price.

41. Getting frustrated with Gallatin's silence and in recognition that it might be a sign Gallatin would use unpaid invoices to leverage execution of a new ICA on unfavorable terms, on June 19, 2006, I placed Gallatin on written notice it was formally disputing the DS-1 charges, as reflected in the April 25 invoice. Prior to remittance of payment, I sought answers from Gallatin on whether or not it would adhere to the billing dispute procedures set forth in the First ICA and thereby properly treat the disputed, unpaid portion of the DS-1 charges. ("I need a reply in writing that Gallatin is refusing to honor the ICA and expects BitWise to pay the full balance, including the disputed amounts. I will be sending a check for \$8,201.20 [the undisputed portion] upon acceptance of my billing claims and confirmation that the billing dispute process, outlined in the ICA (section 21.2), will be followed. I have attached the ICA for your convenience. Please respond as soon as possible, as we would like to resolve our balance with Gallatin immediately.").

42. By September 2006, Gallatin notified BitWise that, by operation of law, the First ICA had expired. However, Gallatin agreed to provide services on a month-to-month basis for an additional month to facilitate negotiation of a new ICA.

43. Thereafter, on October 15, 2006, Gallatin and BitWise executed a Second ICA, which was subsequently filed with the ICC and approved on December 20, 2006.

44. For nearly 10 months, between March 2006 and December 20, 2006, Gallatin provided BitWise with DS-1 UNE Loops pursuant to rates, terms and conditions that were not contained in either an approved Interconnection Agreement or any amendment thereto. Nevertheless, Gallatin always seemed to expect BitWise to pay 100% of the invoiced charges – which is not a condition that was ever mentioned or discussed at the meeting with Fred Miri and Karen Lewis, the only two people (besides myself) that were privy to the meeting.

45. Several months after the meeting, Gallatin began claiming that the “promotional” offering came with some conditions and limitations – conditions & limitations I was unaware of because they were never discussed and never memorialized and agreed to.

46. Gallatin began claiming that the “discounted pricing [for the DS-1s] was a one time promotional offer” and that Gallatin would “render the appropriate discount after the ICA and its associated pricing is in place.”

47. In a September 7, 2006 correspondence, Stephen Murray stated that the “discounted pricing was a one time promotional offer” and that Gallatin would “render the appropriate discount after the ICA and its associated pricing is in place.”

48. In one e-mail, Mr. Murray even claims he was “privy” to the meeting at which the promotion was discussed. But he was not there in person and he was not on the telephone either.

49. To the best of my knowledge, Gallatin did not file any amendment to the First ICA with the ICC nor did it make the “promotional” T-1 pricing available to any other CLECs or publish the rates anywhere that I am aware of. BitWise continued to order T-1s at the quoted price from March until late September 2006.

UNREASONABLE AND DISCRIMINATORY PRACTICES

50. In this part of the Declaration I will address the seemingly never-ending issues BitWise has experienced with Gallatin's provisioning of wholesale services and other business practices which frustrate BitWise's ability to effectively compete for customers in Gallatin's service area.

51. Gallatin has purposely and substantially delayed number porting of BitWise customers as a means of preventing BitWise from taking business away from Gallatin.

52. *For Example:* On 12/14/2005, BitWise submitted a request for transfer of a number for an existing Gallatin client, Bessler Accounting. BitWise did not receive a Firm Order Confirmation ("FOC") until 12/23/05. The subsequent due date given was for 12/28/07. This date was almost two weeks from the date that BitWise made the request; other carriers, such as Verizon and AT&T, do number ports in three days.

53. On 6/2/2006, BitWise submitted a combo order for a loop and number port for Central Illinois Grain Inspection. Gallatin did not even answer the request until almost three weeks later on 6/22/06. Gallatin then gave a due date of 6/28/06, a month after the Order was submitted.

54. And on 12/5/2005, BitWise requested a cooper loop from Gallatin for Mary Abts, who operates Abts Mortuary, Cremation Society of Mid Illinois, and Katy's Pet Burial Supplies from her home. Gallatin River did not even answer the request until 12/14/05, and then gave a due date of 12/21/05 – nearly three weeks after the request was made. The day before the due date, Gallatin disconnected her service. They turned it back on when she called them, but disconnected it again in the morning thereby making it impossible for BitWise to install her service. All of this led to the customer cancelling her order for her business service with BitWise. Gallatin was able to retain service for her businesses because of the delay they caused. The customer specifically stated that she canceled her service with BitWise because of the delays she experience porting numbers over for both her business and home service.

55. Exhibit 1 details a repeated and willful pattern of over one-hundred and fifty instances in which requests for services to Gallatin by BitWise were subjected to excessive and unreasonable number port and install delays.

56. Another substantial reason for many of the delays BitWise encountered in signing up new customers was the existence of a covert policy by Gallatin to cap the number of loops BitWise was able to order to two a day. Gallatin intentionally and purposely instituted this policy to delay the loss of customers to competing CLECs such as BitWise, thereby decreasing competition. This illegal policy is, without a doubt, deliberate to control Gallatin's loss of customers to competing carriers and implementation of this policy is a blatant abuse of Gallatin's status as an incumbent carrier.

57. Exhibit 2 details Gallatin's covert policy to limit the amount of loops available to BitWise, thereby intentionally discriminating against BitWise and substantially limiting competition between the carriers.

58. Gallatin has substantially delayed repairing BitWise customer's lines in order to both reclaim customers from BitWise and unfairly denigrate the service BitWise offers to its customers.

59. *For example:* A BitWise customer, Alicia Elliott, stated that shortly after a BitWise technician left her residence after the installation, a Gallatin River truck pulled up outside her residence and her service stopped working. When the BitWise technician went back to the residence, they found the wires cut in the Network Interface Device ("NID").

60. On another occasion, Gallatin delayed repairs to a BitWise customer, Camp of Champions, for at least three days. BitWise submitted a repair ticket to Gallatin on 10/27/2006 but did not receive an update on this status until 10/30/06, only after BitWise called and inquired about the status of this ticket.

61. Exhibit 3 highlights Gallatin's numerous unreasonable delays in making repairs to BitWise customers' service.

62. Gallatin has purposely provided substandard copper loops that barely work for POTS ("Plain Old Telephone Service"), let alone DSL. This provisioning is discriminatory and intentional, whereby Gallatin will provide service on good, clean loops, while forcing BitWise to provide service on substandard loops.

63. Every time it rains 10-20% of our customers have issues. BitWise has opened numerous trouble tickets and Gallatin has supposedly "fixed" the problem but, these lines still stop working every time it rains.

64. *For example:* One BitWise Customer, TCRC Holiday Center, experiences dropped calls every time it rains. This is because the line is in such bad shape that water gets in it when it rains and causes the DSL to lose sync, which drops their phone calls.

65. Exhibit 4 includes detailed descriptions of Gallatin's provisioning of substandard copper wires to BitWise's customers.

DAMAGES

66. Gallatin's purposeful actions described above and in the referenced exhibits have caused BitWise to lose customers and revenue.

67. Gallatin's purposefully frustrating actions have forced BitWise into constructing separate and duplicative network facilities to compensate for BitWise's inability to obtain facilities and services through Gallatin on a just and reasonable basis. In other words, because Gallatin constantly engages in unreasonable business tactics designed to frustrate BitWise and its prospective customers, BitWise has been forced to overbuild Gallatin's network.

68. But for Gallatin's frustrating tactics, BitWise would have no need to overbuild. Instead, BitWise should be able to rely on Gallatin to provide just and reasonable access to wholesale services pursuant to Gallatin's duties under federal and state laws and the First and Second ICAs between the two companies.

69. To date, the costs incurred by BitWise to construct its network overbuild in Gallatin's exchange areas and the losses it has incurred as a result of its inability to acquire new customers due to ordering suspension and Gallatin's other impediments to competition in violation of Illinois law are \$562,219.23. For each month that Gallatin's actions persist and BitWise is required to continue building an entirely duplicative network just to provide potential customers with unencumbered service, BitWise estimates its damages are equal to \$180,667.96.

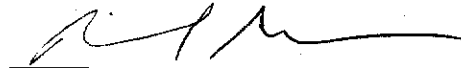
70. In addition, in the past twenty-four months, BitWise has spent over \$30,000 in legal fees and expenses trying to deal with the billing and other disputes unjustly and unreasonably caused by Gallatin. It has also endured substantial legal fees to prepare this complaint.

71. Wherefore, BitWise seeks at least \$650,000.00 in damages, attorney's fees and expenses, an amount which will increase each month by nearly \$200,000 per month until this complaint is resolved.

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Subject to the penalties for perjury, the foregoing is true to the best of my knowledge,
information and belief.

June 22, 2007

A handwritten signature in black ink, appearing to read 'Michael Shuler', written over a horizontal line.

Michael Shuler
BitWise Communications, Inc.

STATE OF ILLINOIS)

COUNTY OF ~~COOK~~)

Peoria 1105

SS.)

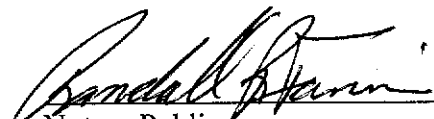
VERIFICATION

I, Michael Shuler, being first duly sworn and on oath state that I am President of BitWise Communications, Inc., as such, am competent to testify on the facts alleged in the Complaint, that I have read the foregoing Complaint filed by Bitwise Communications, Inc. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure and as required under Section 13-515(e) of the Illinois Public Utilities Act, the undersigned certifies that the statements set forth in the attached are true and correct to the best of my knowledge and belief except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same true.



Michael Shuler, President

SUBSCRIBED AND SWORN to
me on 6/21/11, 2007.


Notary Public